

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
SHAFFER & MADSEN, INC., AND)
KENNETH R. **SHAFFER** AND CARROLL D.)
MADSEN; TRANSFEREES)

For Appellants: Duffy, Walton & De Dobbeleer,
Attorneys at Law

For Respondent: Burl D. **Lack**, Chief Counsel;
Peter S. Pierson, Assistant Counsel

O P I N I O N

This appeal is made pursuant to section 25667 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protests of Shaffer & Madsen, Inc., and Kenneth R. Shaffer and Carroll D. Madsen, Transferees, against a proposed assessment of additional franchise tax in the amount of **\$1,361.95** for the income year ended May **31**, 1959.

At a special meeting of appellant corporation's shareholders on October 1, **1958**, with all shareholders present, a resolution was unanimously adopted to dissolve appellant not later than September 30, 1959. On September 15, 1959, a document entitled "Certificate of Voluntary Dissolution" was signed by all the stockholders, showing the action taken at the October 1, 1958, meeting. **It is** alleged that a letter was mailed to the Secretary of State on September 30, **1959**, enclosing the **minutes of** the aforementioned meeting, together with copies of the "Certificate of Voluntary Dissolution."

One paragraph of the letter allegedly read:

Kindly certify one of the enclosed **copies** [of the above certificate] in order that the same **may be** filed in the office of the County Clerk of the County. of **Marin**.

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The Secretary of State, who has no record of receiving the letter, did not reply.

Pursuant to appellant's request, the Franchise Tax Board issued a tax clearance **certificate** on October 7, 1959, the certificate expiring October 15, 1959.

Appellant regarded itself as dissolved, for franchise tax purposes, on September 30, 1959, and measured its tax liability for the taxable year ended **May 31, 1960**, by one-third of the net income for the income year ended May 31, **1959**, relying on section **23332** of the Revenue and Taxation Code.

Respondent disallowed the proration, concluding that appellant did not effect a dissolution on the date claimed.

Section **23332** of the Revenue and Taxation Code provides, in part, that if a corporation dissolves during a taxable year it shall pay a tax only for the, months **of** the taxable year preceding the effective dissolution. date, measured by a percentage of **net** income determined by ascertaining the ratio which **the** months of the taxable year, preceding the effective date of dissolution, bear to the months of the income year. A period of half a month **is** disregarded (Cal. Admin. Code, tit. 18, §§ **23331-23334**, subd. (b)), so a dissolution occurring by October 15, 1959, would be treated as if **it** had occurred on September 30, 1959. Section **23331** of the Revenue and Taxation Code provides, in part, that for franchise **tax** purposes the effective date of dissolution of a corporation **is** the date when the 'certificate of winding up and dissolution **is** filed with the Secretary **of** State.

The Corporations Code contemplates that in the case of a voluntary dissolution there **shall** first be filed with the **Secretary** of State a certificate of election to wind up and dissolve, a copy of which, certified by the Secretary of **State**, **is** to be filed with the clerk of the county in which the corporation **is** located. (Corp. Code, § 4603.) Then, when the corporation **is** completely wound up, a tax clearance certificate **is** to be filed with the **Secretary** of State, followed by the filing of the certificate of winding up and dissolution. (Corp. Code, §§ 5200, 5201.)

The certificate of winding up and dissolution must be verified by affidavit and must state, among other things,

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that the corporation has been **completely** wound up, whether its **known** debts and liabilities have been paid **or** adequately provided for, and whether its known assets were distributed to shareholder⁸ or wholly applied to debts. (Corp. Code, § 5200.) The "Certificate of Voluntary Dissolution" filed by appellant was not verified and did not contain any of the specified information.

Appellant does not contend that the document filed by it qualified as the **required** certificate of winding up and dissolution **but** contend⁸ that the state is estopped to deny the dissolution because the state prevented appellant from completing the required steps. This contention is based upon the fact that the Secretary of State did not certify a copy of the document which **appellant** filed and upon the claim that the tax clearance certificate issued by respondent did not allow **sufficient** time for compliance.

Initially, it must **be noted** that appellant has not established that its "Certificate of Voluntary Dissolution" and request for certification of a **copy of** that document was in fact mailed, properly addressed; to the Secretary of State. The Secretary of State **has no** record of its receipt.

Even assuming that the letter and enclosures were properly mailed, and also assuming that inaction by the Secretary of State could **estop** the Franchise Tax Board, it is the rule that estoppel will not be invoked against the government or its agencies except in rare and unusual circumstances. (California Cigarette Concessions, Inc. v. City of Los Angeles, 53 Cal. 2d 865 [3 Cal. Rptr. 675, 350 P.2d 715]; United States Fidelity & Guaranty Co. v. State Board of Equalization, 47 Cal. 2d 384 [303 P.2d 1034]; Aebli v. Board of Education, 62 Cal. App. 2d 706, 729 [145 P.2d 601].) And, in any **event**, the doctrine of estoppel does not erase the duty of due **care**. (Hampton v. Paramount Picture⁸ Corp., 279 F.2d 100.) Appellant made no effort to find out **why** there was no response to its request or to **expedite** the **response** and never attempted to file the actual certificate of winding up and dissolution. The franchise tax clearance certificate allowed ample **time for** appellant to file the proper document⁸ **if** it had acted with reasonable diligence. In our **view**, appellant's **lack of** diligence leaves it in an untenable position to **claim estoppel**.

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O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause **appearing** therefor,

IT IS **HEREBY** ORDERED, ADJUDGED AND DECREED, pursuant to section 25667 of **the** Revenue and Taxation Code, that the **action** of the Franchise Tax Board on the protests of Shaffer & Madsen, Inc., and Kenneth R. Shaffer and Carroll D. Madsen, Transferees, against a proposed assessment of additional franchise tax in the amount of **\$1,361.95** for the income year ended May 31, 1959, be and the same is hereby sustained.

Done at San Francisco , California, this 17th day
of **March** , 1964, by the State Board of Equalization.

Paul R. Leake, Chairman
John W. Lynch, Member
Robert J. Smith, Member
Paul H. Smith, Member
_____, Member

ATTEST: P. F. Freeman, Secretary